NO. LND CV 11-6035946-S	:	SUPERIOR COURT
PROCUREMENT, LLC	:	LAND USE LITIGATION DOCKET
V.	:	AT HARTFORD
ZONING BOARD OF THE CITY OF STAMFORD	:	FEBRUARY 14, 2014

MEMORANDUM OF DECISION

I

The plaintiff, Procurement, LLC, appeals from the decision of the defendant, the city of Stamford zoning board (board), denying its applications for a special exception and for approval of site plan and architectural plans and/or requested uses (collectively, applications). On April 20, 2010, the plaintiff applied to develop a 14,136 square foot, two-story building providing for a day care center for 120 children and nine residential units with associated playground, driveway, and parking at 11 Maplewood Place and at 808, 812, 816, 820, and 826 High Ridge Road in Stamford. The site is 51,131 square feet and fronts High Ridge Road on the west side, and is bounded to the south by Maplewood Place, with vehicle access to Bradley Place through other property owned by the plaintiff.

Public hearings were conducted on December 6, 2010 and December 13, 2010. On January 10, 2011, the board discussed and denied the application for a special permit and did not act on the application for site plan and architectural plans

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and/or requested uses. Notice was published in the Stamford Advocate on January 14, 2011, and this appeal was commenced on January 28, 2011.

On February 22, 2012, Gurpreet Ahuja, who owns property within 100 feet of the subject property, moved to intervene. After objection and argument, the court, *Adams, J.*, denied the motion on May 30, 2012. In the court's memorandum of decision (#122.00), it noted that Ahuja had a pending action concerning another application by the plaintiff involving the same property, *Ahuja* v. *Zoning Board of the City of Stamford*, Superior Court, land use litigation docket at Hartford, Docket No. LND CV-12-6035945-S (*Ahuja* appeal). On June 18, 2012, Ahuja filed a petition for certification on the denial of the motion to intervene that the Appellate Court granted on October 24, 2012.

The *Ahuja* appeal was heard by this court on November 30, 2012. On January 4, 2013, this court affirmed the board's conditional approval of a July 28, 2011 application for a different use of the subject properties. Specifically, the board conditionally approved a 28,300 square foot, two-story building containing ten residential units and a child day care center for ninety children, together with an approximately 12,000 square foot, two and one-half story building containing twelve dwelling units. On February 13, 2013, Ahuja filed a petition for certification to the Appellate Court.

By agreement of the parties, the present case was stayed until after this court heard the *Ahuja* appeal. Moreover, this court advised the parties that it would wait for a decision from the Appellate Court on the *Ahuja* appeal before proceeding with

the present case. The Appellate Court denied the petition for certification of the *Ahuja* appeal on July 24, 2013.

Meanwhile, in the present case, the plaintiff moved to implead Ahuja on May 23, 2013, and the court granted the motion on August 23, 2013. On October 4, 2013, Ahuja withdrew the appeal of the denial of the motion to intervene and filed a brief on October 15, 2013. Briefs had previously been filed by the plaintiff and the defendant on August 24, 2012, and September 21, 2012, respectively. On September 26, 2012, the plaintiff filed a memorandum in reply. Trial was held on December 6, 2013.

At trial, the parties stipulated that the plaintiff was the owner of the parcels at the time of application and at the time of the public hearing and of the trial. Therefore, this court found that the plaintiff is aggrieved. See *Winchester Woods Associates* v. *Planning & Zoning Commission*, 219 Conn. 303, 307, 592 A.2d 953 (1991).

II

"General Statutes § 8-2 (a) provides in relevant part that local zoning regulations may provide that certain . . . uses of land are permitted only after obtaining a special permit or special exception . . . subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. . . . The terms special permit and special exception are interchangeable. . . . A special permit allows a property owner to use his property in a manner expressly permitted by the local zoning regulations. . . . The proposed

use, however, must satisfy standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience and property values. . . . When ruling upon an application for a special permit, a planning and zoning board acts in an administrative capacity. . . . [Its] function . . . [is] to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. . . . We have observed that the nature of special [permits] is such that their precise location and mode of operation must be regulated because of the topography, traffic problems, neighboring uses, etc., of the site. . . . Review of a special permit application is inherently fact-specific, requiring an examination of the particular circumstances of the precise site for which the special permit is sought and the characteristics of the specific neighborhood in which the proposed facility would be built. . . .

"Our Supreme Court has concluded that general considerations such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special permit. Also, [it has] stated that before the zoning commission can determine whether the specially permitted use is compatible with the uses permitted as of right in the particular zoning district, it is required to judge whether any concerns . . . would adversely impact the surrounding neighborhood. . . . Generally, it is the function of a zoning board or commission to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the

manner in which it does apply. The . . . trial court ha[s] to decide whether the board correctly interpreted the section [of the regulations] and applied it with reasonable discretion to the facts. . . . In applying the law to the facts of a particular case, the board is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal. . . .

"In reviewing a decision of a zoning board, a reviewing court is bound by the substantial evidence rule. . . . The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission]. . . . The question is not whether the trial court would have reached the same conclusion . . . but whether the record before the [commission] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given. . . .

"This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to

be drawn from it is one of fact for the jury. . . . The substantial evidence rule is a compromise between opposing theories of broad or de novo review and restricted review or complete abstention. It is broad enough and capable of sufficient flexibility in its application to enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication. On the other hand, it is review of such breadth as is entirely consistent with effective administration." (Citations omitted; internal quotation marks omitted.) *Meriden* v. *Planning & Zoning Commission*, 146 Conn. App. 240, 244-47, 77 A.3d 859 (2013).

"In light of the existence of a statutory right of appeal from the decisions of local zoning authorities . . . a court cannot take the view in every case that the discretion exercised by the local zoning authority must not be disturbed, for if it did the right of appeal would be empty." (Internal quotation marks omitted.) *Martland* v. *Zoning Commission*, 114 Conn. App. 655, 661, 971 A.2d 53 (2009). A commission cannot deny a special exception if the regulation and statutes are satisfied. *Westport* v. *Norwalk*, 167 Conn. 151, 155, 355 A.2d 25 (1974); see also *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 628, 711 A.2d 675 (1998) ("[a] zoning commission does not have discretion to deny a special permit when the proposal meets the [applicable] standards"). "The evidence supporting the decision of a zoning board must be substantial. . . . The corollary to this rule is that absent substantial evidence in the record, a court may not affirm the decision of the board." (Citations omitted.) *Martland* v. *Zoning Commission*, supra, 663. "A mere worry is not substantial evidence." *Lord Family of Windsor, LLC* v. *Inland Wetlands &*

Watercourses Commission, 103 Conn. App. 354, 365, 928 A.2d 1237 (2007), aff'd, 288 Conn. 669, 954 A.2d 133 (2008).

III

In the plaintiff's complaint, it alleges that it submitted all necessary documentation to support its applications and that the board's denial of its applications was not supported by substantial evidence. In the board's brief, it argues that the plaintiff did not satisfy the standards of the zoning regulations because the board was entitled to know the proposed use of part of the property known as parcel A. The plaintiff argues in its memorandum in reply that the board could not deny the applications based upon speculation about potential issues in the future. This court agrees.

The property had been recently rezoned from R-10 to RM-1 which allows day care centers subject to a special exception. (Return of Record [ROR], Item 17.) The plaintiff included a September 29, 2010 traffic statement from its engineer, Tighe and Bond, Inc., that states: "Although the site is expected to generate more traffic than today, the proposed site access, layout and improvements will improve traffic operation and traffic safety along High Ridge Road between Maplewood Place and Bradley Place/Donata Lane. The proposed development . . . will provide better access management along High Ridge Road. . . . The closure of existing curb cuts, and the construction of new driveways will reduce the potential of motor vehicle crashes due to site traffic and presence of the private driveways. . . . The proposed development will also provide more than [$100,000] to support the [c]ity of

Stamford's desire to install a new traffic signal control at the High Ridge Road and Bradley Place/Donata Place intersection. . . . The installation of [a] traffic signal will significantly reduce High Ridge Road left turns and the side street delays on either approach. . . . The traffic signal will also reduce the potential of high speed vehicle and pedestrian conflicts." (ROR, Item 13.) In a report, dated September 29, 2010, the city's traffic engineer stated, "There are no adverse traffic impacts due to the proposed development. . . . [The] proposed traffic circulation will significantly improve safety and operation." (ROR, Item 14.) The city's planning board unanimously voted to recommend approval of the application for a special exception. (ROR, Item 15.) The city's planner submitted a report indicating that the materials satisfied the zoning requirements with the exception that the landscaping plan had not yet been provided. (ROR, Item 17.) In light of the above and as no traffic expert testified in opposition to them, there is no support in the record to justify the board's denial of the plaintiff's applications because of traffic. Indeed, the board does not argue that the applications were denied based upon traffic concerns.

An application for a special exception is subject to § 19.3.2 of the zoning regulations of the city of Stamford and site plan approval is subject to § 7.2 of the regulations.[1] Section 19.3.2.a, in relevant part, states: "Special Exceptions shall be granted by the reviewing board only upon a finding that the proposed use or structure

[1] The regulations were not originally returned as part of the record. After discussion at and after trial, the parties jointly filed the relevant sections of the zoning regulations on December 16, 2013 and on December 30, 2013 (## 167.00 and 168.00). Thus, they are referred to herein as the regulations.

or the proposed extension or alteration of an existing use or structure is in accord with the public convenience and welfare after taking into account, where appropriate:

"(1) the location and nature of the proposed site including its size and configuration, the proposed size, scale and arrangement of structures, drives and parking areas and the proximity of existing dwellings and other structures.

"(2) the nature and intensity of the proposed use in relation to its site and the surrounding area. Operations in connection with special exception uses shall not be injurious to the neighborhood, shall be in harmony with the general purpose and intent of these Regulations, and shall not be more objectionable to nearby properties by reason of noise, fumes, vibration, artificial lighting or other potential disturbances to the health, safety or peaceful enjoyment of property than the public necessity demands.

"(3) the resulting traffic patterns, the adequacy of existing streets to accommodate the traffic associated with the proposed use, the adequacy of proposed off-street parking and loading, and the extent to which the proposed driveways may cause a safety hazard, or traffic nuisance.

"(4) the nature of the surrounding area and the extent to which the proposed use or feature might impair its present and future development.

"(5) the Master Plan of the City of Stamford and all statements of the purpose and intent of these regulations."

Additionally, § 19.3.2.b, in relevant part, states, "In granting a Special Exception the reviewing board may attach reasonable conditions and safeguards as it deems necessary to protect the general health, safety, welfare and property values of the neighborhood. . . ." The purpose of the RM-1 district is described in § 9.E.1 as "to set aside and protect areas which have been or may be developed predominantly for low density multi-family dwellings of various types. These districts may be located adjacent to single family districts and provide for a logical transition in density between such districts and higher intensity zones. Certain non-residential uses are permitted as-of-right or by Special Exception by the Zoning Board, subject to

adequate conditions and safeguards. It is intended that new development permitted in this district be compatible and harmonious with existing buildings. It is hereby found and declared further that these regulations are necessary to the protection of these areas and that their protection is essential to the maintenance of a balanced community of sound residential areas of diverse types."

General Statutes § 8-3c (b), in relevant part, provides that "[w]henever a commission grants or denies a special permit or special exception, it shall state upon its records the reason for its decision. . . ." "The [planning and zoning] commission's failure to state on the record the reasons for its actions, in disregard of General Statutes § 8-3, renders appellate review more cumbersome, in that the trial court must search the entire record to find a basis for the commission's decision." *Parks* v. *Planning & Zoning Commission*, 178 Conn. 657, 661-62, 425 A.2d 100 (1979). "[M]ere utterances of an individual member do not constitute a formal, official collective statement of the entire board." (Internal quotation marks omitted.) *Richardson* v. *Zoning Commission*, 107 Conn. App. 36, 45, 944 A.2d 360 (2008).

In the present case, the board should have specifically stated its collective reasons for denying the application; see General Statutes § 8-3c (b); but it did not. The court must, therefore, review a record filled only with individual utterances to glean why the board denied the application. The December 6, 2010 board minutes reflect that the use of parcel A was a concern to the chairperson of the board, Audrey Cosentini. (ROR, Item 19; Item 20, pp. 30-32; Item 24, pp. 114-15.) Cosentini and board member Kathleen Donahue brought up parcel A again in the deliberations on

January 10, 2011. (ROR, Item 27, p. 6; Item 28, pp. 4, 13, 14.) Cosentini explained that she did not vote in favor of the zone change, did not want commercial development in the neighborhood, and would prefer development of the property as apartments. (ROR, Item 28, pp. 3-5.) Cosentini, Donahue, and David Stein, another board member, expressed concern as to the change of character of the neighborhood because of commercial development with the day care center and the potential for traffic. (ROR 28, pp. 3-4, 11- 12, 20-21.) Board members Harry Parson and Maria Nakian felt that traffic was not an issue and Nakian stated that she did not see the day care as commercial development. (ROR, Item 28, pp. 5, 7, 18.).

The search of the record reveals that at least two members of the board were concerned about the impact of development of parcel A.[2] In its brief, the board

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[2] To the extent that some board members may have worried about "commercial creep" because of the day care center, this court notes that prior to this application, the board changed the existing zone to one which would allow a day care center subject to a special exception. The day care center use may not be permitted as of right requiring perhaps only a site plan; see *Lord Family of Windsor, LLC* v. *Inland Wetlands & Watercourses Commission*, 288 Conn. 730, 739, 954 A.2d 831 (2008) ("[t]he designation of a particular use of property as a permitted [as of right] use establishes a conclusive presumption that such use does not adversely affect the district"); but it is also not categorically excluded from the zone. See *Burlington* v. *Jencik*, 168 Conn. 506, 509, 362 A.2d 1338 (1975) ("[a]n exception allows him to put his property to a use which the enactment expressly permits" [internal quotation marks omitted]). "The special permit authorizes those uses that are explicitly permitted in the regulations." (Emphasis in original.) T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) p. 177. Special exception review focuses on the concerns, such as traffic, that might impact the surrounding neighborhood. See *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 432-33, 941 A.2d 868 (2008) ("[W]hen a use is not allowed as of right, but only by special exception, the zoning commission is required to judge whether any concerns, such as parking or traffic congestion, would adversely impact the surrounding neighborhood. . . . The reason for this requirement is that, although such uses are not as intrusive as commercial uses . . . they do generate parking and traffic problems that, if not properly planned for, might undermine the residential character of the neighborhood." [Citation omitted; internal quotation marks omitted.]). Additionally, this court notes that, while this appeal was pending, the board approved

asserts that without knowing what use would be proposed for parcel A, it could not make a determination that the use for the whole parcel would in fact meet the requirements of the regulations. While the board may have been able to render a more comprehensive decision if the plaintiff had included its plans for parcel A in the application, nothing in the regulations requires a landowner to present a build-out of every part of its land. Segmenting out parcels for future development obviously brings some risk that future plans may not be approved, but that is a risk that an owner or developer may lawfully take. A decision to designate a parcel as vacant does not necessarily mean that a board may never consider that parcel in its decision making process; situations may differ and approvals or denials may well be based on the impact from the segmented parcel. The board is always allowed to determine whether an application meets its regulations. See R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (3d Ed. 2007) § 33.4, p. 242 ("The agency has reasonable discretion in deciding whether the proposed use meets the conditions in the zoning regulations. The agency cannot deny a special permit which meets the standards in the zoning regulations, but it has discretion to determine *whether* the proposal meets the standards contained in the regulations." [Emphasis in original.]).

Prior to consideration of the application, the board changed the zone for the entire parcel on July 25, 2010 (effective August 10, 2010) allowing for multifamily

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the plaintiff's July 2011 application which included a day care center for up to ninety children (and which resulted in the *Ahuja* appeal). See *Manor Development Corp.* v. *Conservation Comm.*, 180 Conn. 692, 696-97, 433 A.2d 999 (1980) (acknowledging factual developments occurring while appeal pending).

dwellings and family day care homes, and, by special exception, hospital complexes, nursing homes, and uses allowed in the R-6 district, including day care centers, group day care homes, and day camps. (Regulations, §§ 9.E, 4.3.) Nothing in the record here indicates that the application did not "satisfy standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience and property values."[3] See *Meriden* v. *Planning & Zoning Commission*, supra, 146 Conn. App. 244. The board could not deny the special exception if the regulations and statutes were satisfied. See *Westport* v. *Norwalk*, supra, 167 Conn. 155.

Additionally, the board could not deny the application for a special exception based upon speculation. See *Armstrong* v. *Zoning Board of Appeals*, 158 Conn. 158, 168, 257 A.2d 799 (1969) ("[t]he board was not required to anticipate that [the applicant] would later violate the zoning regulations by a use not authorized by the regulations, and, should such a violation occur, the ready remedy is by proper legal action at that time"); see also *Miklus* v. *Zoning Board of Appeals*, 154 Conn. 399, 402, 225 A.2d 637 (1967); *Oakbridge/Rogers Avenue Realty, LLC* v. *Planning & Zoning Board*, 78 Conn. App. 242, 249-50, 826 A.2d 1232 (2003).[4] Whatever future plans the plaintiff may have for parcel A is a matter of speculation which does not

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[3] The court notes that this matter is unlike an agency's denial of an application due to the applicant's failure to submit required information. See *Newtown* v. *Keeney*, 234 Conn. 312, 324, 661 A.2d 589 (1995) (holding that plaintiff's failure to provide hydrogeological study was substantial evidence to support denial of plaintiff's permit application).

[4] This principle is also applicable in the context of subdivisions. See *Federico* v. *Planning & Zoning Commission*, 5 Conn. App. 509, 514-15, 500 A.2d 576 (1985).

constitute substantial evidence. "A mere worry is not substantial evidence." *Lord Family of Windsor, LLC* v. *Inland Wetlands & Watercourses Commission*, supra, 103 Conn. App. 365. Furthermore, as conceded by the plaintiff's counsel, any future development of parcel A would require a further application and review by the board. Hence, the court finds there is no substantial evidence in the record to support the board's denial of this application for a special exception and lack of action on the application for site plan and architectural plans and/or requested uses.

Accordingly, the appeal is sustained as to the application for special exception and remanded to the board for review of the site plan and related applications.

Berger, J.